

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

PRO PAGE PARTNERS, LLC

Debtor.

No. 00-22856  
Chapter 7

PRO PAGE PARTNERS, LLC,

Plaintiff,

vs.

JAMES L. POTTER and  
SHIRLEY W. POTTER,

Defendants.

Adv. Pro. No. 01-2034

**M E M O R A N D U M**

APPEARANCES:

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**MARCIA PHILLIPS PARSONS**  
**UNITED STATES BANKRUPTCY JUDGE**

In this adversary proceeding the plaintiff, Pro Page Partners, LLC, seeks a determination pursuant to 11 U.S.C. §§ 544 and 552 of the extent of the security interest held by the defendants, James and Shirley Potter, and the avoidance of certain transfers by Pro Page to the Potters pursuant to 11 U.S.C. §§ 544, 547, 548 and 550. Presently before the court are the parties' cross motions for summary judgment regarding the extent of the Potters' security interest. At issue is whether the Potters have a security interest in all accounts generated by Pro Page at its Merchants Road location or only accounts in existence at the time the security interest was created. Also to be resolved is whether the revenues earned postpetition on these accounts constitute proceeds under 11 U.S.C. § 552. As discussed below, the court concludes that the Potters' security interest extends to all accounts generated prepetition at the Merchants Road location, but that the postpetition revenues are not proceeds. Accordingly, the motions for partial summary judgment will be both granted and denied in part. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A), (F) and (K).

#### I.

On or about September 2, 1997, Pro Page purchased certain assets from Good Faith Enterprises of Knoxville. The acquisition was financed in part by a \$200,000 loan to Pro Page from the Potters. To secure the loan, Pro Page entered into a security agreement with the Potters and a financing statement

was filed with the Tennessee Secretary of State on September 15, 1997. As described in the financing statement,<sup>1</sup> the stated collateral for the loan was:

All property of Debtor which is acquired from Good Faith Enterprises of Knoxville, Tennessee, including specifically, without limitation, the contracts for paging services, whether now owned or hereafter acquired, including, but not limited to the property described on Exhibit A and including all products and proceeds thereof, including insurance proceeds, and all contracts generated by or attributable to the efforts of the Merchants Road location of Debtor in Knoxville, Tennessee.

The attached Exhibit A referenced in the description listed the following items:

Total customers 1,764  
1 Epson 386SX Computer - SN 4451001141  
1 WYSE Monitor - SN 900252-01  
1 Texas Instruments Omni 850 Printer - SN 3285031190  
1 Samsung ST 8000 Programmer  
1 Nixxo ST 8100 Programmer  
1 Panasonic 3-line Telephone  
1 GE 2-line Telephone  
2 Office Desks  
2 Office Chairs  
1 File Cabinet 2-drawer

Check marks on the financing statement indicated that proceeds and products of collateral were also covered by the financing statement.

Pro Page filed for bankruptcy relief under chapter 11 on October 23, 2000, and commenced this adversary proceeding as debtor in possession on June 8, 2001. Thereafter, on September 4, 2001, the bankruptcy case converted to chapter 7, such that

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<sup>1</sup>The description of collateral in the security agreement is virtually identical and there has been no allegation that a discrepancy exists between the two documents.

the chapter 7 trustee is now the real party in interest plaintiff although entry of an order of substitution has not been requested.

In their motion for partial summary judgment filed September 13, 2001, the Potters seek summary judgment with respect to Count II of the complaint. In Count II, Pro Page alleges that the collateral for the Potters' loan is limited to the items listed in Exhibit A, specifically the original 1,764 paging contracts, and that the description is unenforceable or ineffective to the extent it could be read as creating a security interest in "after-acquired property," i.e., the paging contracts generated by Pro Page after execution of the security agreement. According to Pro Page, any lien which may have been created by the defective description is avoidable pursuant to a trustee's strong-arm powers under 11 U.S.C. § 544. Therefore, Pro Page requests that the court declare that the Potters' security interest is "limited to the portion of the original 1,764 customers still in place on October 23, 2000 (the date of the bankruptcy filing)." Pro Page also asks in Count II that the court "declare and determine the value of such collateral under 11 U.S.C. § 506 and, as a result, the amount of the Potters' secured claim."

In their motion for partial summary judgment, the Potters allege that contrary to the allegations in the complaint, their security interest is not limited to the customer contracts acquired by Pro Page from Good Faith Enterprises. Instead, they

assert that they have a security interest in all customer contracts which arose at Pro Page's Merchants Road location, that this security interest extends to postpetition proceeds, and that these proceeds are cash collateral.

In response to the Potters' motion, Pro Page filed its own motion for partial summary judgment on October 26, 2001. Pro Page asserts therein that the facts are undisputed, that it is entitled to judgment as a matter of law based on the allegations in Count II of its complaint, and that the Potters' motion must be denied.

## II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). As evidenced by the positions taken by the parties in their motions

and memoranda, there is no dispute as to any material fact and the issues presented to the court are purely legal in nature.

### III.

The nature, extent and validity of a security interest is determined by reference to state law. *Butner v. United States*, 440 U.S. 48 (1979). As Pro Page notes in its memorandum of law, under the Uniform Commercial Code as adopted in Tennessee, the creation of a security interest requires a security agreement that describes the collateral unless the collateral is in the possession of the secured party. TENN. CODE ANN. § 47-9-203(1).<sup>2</sup> “[A]ny description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.” TENN. CODE ANN. § 47-9-110. As set forth in the official comment to this statute, “[t]he test of sufficiency of a description laid down by this section is that the description do the job assigned to it -- that it make possible the identification of the thing described.” *Id.* cmt.

The Potters assert in the summary judgment motion that their security agreement sufficiently describes after-acquired customer contracts. According to the Potters, the collateral descriptions in the security agreement and financing statement

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<sup>2</sup>Although the cited Tennessee statutes were amended effective July 1, 2001, pursuant to Tennessee’s adoption of the Revised Article 9, the parties in this case are in agreement that the former version of Article 9 as adopted in Tennessee is the applicable law.

set forth two separate types of property connected by the word "and." As broken down by the Potters, these two categories are:

1. All property ... acquired from Good Faith Enterprises of Knoxville, Tennessee, including specifically, without limitation, the contracts for paging services, **whether now owned or hereafter acquired including**, but not limited to the property described on Exhibit A and including all products and proceeds thereof, including insurance proceeds.

2. All contracts generated by or attributable to the efforts of the Merchants Road location of Debtor in Knoxville, Tennessee.

The Potters assert that the language "whether now owned or hereafter acquired" which immediately follows "the contracts for paging services" in the first category "can only refer to property which was acquired after the transfer from Good Faith Enterprises, because Good Faith Enterprises sold the Merchant's Road location to debtor." Similarly, the Potters contend that the second category also covers after-acquired contracts since it plainly describes customer contracts generated by Pro Page at its Merchants Road location and sets forth no time limitation.

With respect to the first "category" of collateral quoted above, the court disagrees that it sufficiently describes customer contracts of Pro Page which were created after execution of the security agreement. Reduced to its essence, the first phrase covers: "all property ... acquired from Good Faith Enterprises including the contracts for paging services whether now owned or hereafter acquired ...." Although after-acquired contracts are referenced in this language, one would logically conclude from reading the description that the after-

acquired provision is limited to contracts for paging services subsequently acquired from Good Faith Enterprises. As there are no such contracts and this phrase does not describe the contracts in which the Potters are now asserting a security interest, it cannot be said that the collateral is sufficiently identified.

Also, the use of the word "including" is a qualifier which describes or limits rather than expands the words which precede it. In *In re Wright*, the question before the court was whether the words "including all trade, domestic and ornamental fixtures" which followed the words "all machinery, apparatus, equipment, fittings and fixtures," created additional collateral or merely a description of the first clause. *Wright v. C & S Family Credit Inc. (In re Wright)*, 128 B.R. 838, 841 (Bankr. N.D. Ga. 1991). The court concluded the latter based on the use of the qualifying word "including." *Id.* at 843.

With respect to the so-called second category of collateral, the court agrees with the Potters' conclusion that it plainly covers all customer contracts generated by the Pro Page at its Merchants Road location, regardless of when they were created. As the Potters note, there is no time limitation in the clause. The use of the conjunctive word "and" indicates that the phrase which follows is an addition rather than a modification of the first phrase "all property ... acquired from Good Faith Enterprises." Furthermore, although as noted above the first category of collateral is not sufficient in and of itself to

create a security interest in any contracts other than those in existence at the time the security agreement was created, when the entire description of collateral is read as a whole, it plainly evidences an intent to cover customer contracts generated in the future. For this reason, the court rejects Pro Page's assertion that the phrase "all contracts" is so vague that it could virtually mean any type or form of contract. Despite the wordiness and awkwardness of the collateral description, it sufficiently identifies the collateral in which the Potters now assert a security interest: the paging contracts generated by Pro Page at its Merchants Road location. The cases cited by Pro Page in support of its assertion that the Potters' security interest is not adequately described are distinguishable. In *In re Nendels-Medford Joint Venture*, the bankruptcy court concluded that under Oregon law, revenues generated by a motor inn did not fall within the collateral description of "rents, leases, issues, income, profits, and accounts receivable," but were instead accounts or contract rights. *In re Nendels-Medford Joint Venture*, 127 B.R. 658, 667-669 (Bankr. D. Oregon 1991). The court noted that the fact that the list of collateral did not specifically contain a reference to either accounts or contract rights, "may not be fatal in all instances; but it is dangerous, when attempting to take a security interest in an intangible chose in action, not to use the category descriptions created under the Code." *Id.* at 669. The present case, of course, does not concern motel revenues or

an interpretation of the collateral description at issue in *Nendels-Medford*. And, while the court agrees with the *Nendels-Medford* court that it may be "dangerous" not to utilize the U.C.C. category descriptions, the failure was not fatal in the present case. Unlike the creditor in *Nendels-Medford* who was unsecured because it had chosen the wrong general categories to describe its collateral, the Potters did not rely on generic descriptions, choosing instead to more specifically identify their collateral as "all contracts ..." and all of the verbiage which preceded it. Because the collateral in question is sufficiently identified by this description, the Potters do not suffer the same fate as the creditor in *Nendels-Medford*, notwithstanding their failure to utilize the specific U.C.C. nomenclature.

Similarly, the case of *In re Levitz Ins. Agency, Inc.*, cited by Pro Page does not compel a contrary result. The issue before the court therein was whether a security agreement which granted a security interest in "the customer list annexed hereto as Exhibit 'A' ... and all proceeds and products thereof" covered the customer insurance accounts of an insurance agency. *Levitz v. Arons Arcadia Ins. Agency, Inc. (In re Levitz Insurance Agency, Inc.)*, 152 B.R. 693, 697 (Bankr. D. Mass. 1992). The court concluded that it did not because "[t]he agreement refer[red] only to the customer list as collateral, not accounts." *Id.* In the present case, however, the collateral of

Potters does not consist solely of the items set forth in Exhibit A because the description states "including, but not limited to the property described on Exhibit A ...." Also, unlike *Levitz*, the description in the body of the Potters' security agreement is not limited to just the number or names of the customers but specifies a security interest in the contracts themselves. Accordingly, the court concludes that Potters' security agreement granted a security interest in all contracts for paging services generated or attributable to the efforts of Pro Page at its Merchant Road location, not just the contracts in existence at the time the security agreement was executed.

Nonetheless, the Potters' after-acquired property clause was cut off by Pro Page's bankruptcy filing on October 23, 2000, pursuant to § 552(a) of the Bankruptcy Code. Under this subsection, "property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a). Thus, the Potters' security interest extended only to contracts generated prepetition by Pro Page at its Merchants Road location.<sup>3</sup>

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<sup>3</sup>From Pro Page's memorandum of law, it appears that Pro Page believes that the Potters are asserting a security interest in not only the contracts generated at the Merchants Road location prepetition, but also those generated at this location postpetition. This argument is not made by the Potters in their memorandum and the law is clear that "11 U.S.C. § 552(a) cuts off the effect of after-acquired property clauses found in  
(continued...)

The only exception to this rule is set forth in subsection (b) of § 552 which provides that a prepetition security interest extends to postpetition "proceeds, product, offspring, or profits" of the prepetition interest if permitted by the security agreement and applicable nonbankruptcy law, except to the extent that the court orders otherwise based on the equities of the case. See 11 U.S.C. § 552(b)(1).<sup>4</sup> The Potters assert that any revenues received postpetition by the Pro Page with respect to the prepetition Merchants Road contracts are proceeds within the meaning of § 552(b) covered by their security agreement. In support of this assertion, the Potters cite *James Cable Partners, L.P. v. Citibank, N.A. (Matter of James Cable Partners)*, 141 B.R. 772 (Bankr. M.D. Ga. 1992), wherein the court concluded that a creditor's security interest in accounts

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<sup>3</sup>(...continued)  
security instruments." *Third Nat'l Bank v. Fischer (In re Fischer)*, 184 B.R. 293, 300 (Bankr. M.D. Tenn. 1995).

<sup>4</sup>This subsection states that:  
Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b)(1).

and general intangibles of a cable television company extended to postpetition payments from prepetition subscribers. On the other hand, Pro Page denies that the postpetition revenue constitutes proceeds, contending that "proceeds" is a term of art referring to the revenue produced when collateral is disposed or liquidated in some fashion. Because the payments received by Pro Page in the present case are payments pursuant to the contracts rather than from their liquidation, they are not "proceeds," according to Pro Page.

The Bankruptcy Code does not define "proceeds." In light of this absence and the fact that § 552(b)(1) limits security interests "to the extent provided by ... applicable nonbankruptcy law," many courts defer to state law in determining the scope of "proceeds." See, e.g., *Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.)*, 907 F.2d 1430, 1437 (4th Cir. 1990); *In re Mintz*, 192 B.R. 313, 318-19 (Bankr. D. Mass. 1996); *In re Rumker*, 184 B.R. 621, 624 (Bankr. S.D. Ga. 1995). See also cases collected at 5 COLLIER ON BANKRUPTCY ¶ 552.02[2] n.8 (15th ed. rev. 2001). Others have adopted a broader, more liberal view of proceeds, based on the legislative history to § 552 which indicates that "the term 'proceeds' is not limited to the technical definition of that term in the U.C.C., but covers any property into which property subject to the security interest is converted." See 5 COLLIER ON BANKRUPTCY ¶ 552.02[2] (quoting H.R. REP. No. 95-595, 95th Cong., 1st Sess. 376-77 (1977)) and cases cited in n.9.

In rejecting this analysis, the Fourth Circuit Court of Appeals stated:

[W]e believe that Section 552(b)'s express reference to "nonbankruptcy law" should take priority over a vague and isolated piece of legislative history. We also note that the judicial creation of a definition for "proceeds," broader post-petition than pre-petition, would produce arbitrary and potentially inequitable results. As a result, we hold that the UCC's definition and treatment of proceeds applies to Section 552 of the Bankruptcy Code.

*In re Bumper Sales, Inc.*, 907 F.2d at 1437. This court agrees with that analysis and will accordingly look to Tennessee law<sup>5</sup> to ascertain the scope of "proceeds."

The version of Tennessee law in effect at the time the security agreement was entered into and the bankruptcy case filed defined "proceeds" in part as "whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds." TENN. CODE ANN. § 47-9-306(1).<sup>6</sup> In construing the identical provision under Oklahoma law, the Tenth Circuit Court of Appeals observed that each of the events stated

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<sup>5</sup>The security agreement provides that "[t]he laws of the State of Tennessee shall govern and control the construction, enforceability, validity and interpretation of this Agreement and any Other Agreements."

<sup>6</sup>One court has noted that this U.C.C. definition is not inconsistent with the legislative history to § 552(b), which indicates that "'proceeds'... covers any property into which property subject to the security interest is converted." *In re Muzzey*, 134 B.R. 800, 804-05 (Bankr. D. Vt. 1991). See also *Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd.*, 177 B.R. 843, 850 (N.D. Ohio 1994) ("Although broader than the definition in UCC § 9-306(1), the federal approach still maintains 'conversion' as the essential aspect of 'proceeds.'").

in the definition, "describes an event whereby one asset is disposed of and another is acquired as its substitute." *FDIC v. Hastie (In re Hastie)*, 2 F.3d 1042, 1045 (10th Cir. 1993) (The court held that stock dividends were not proceeds of stock because "stock is not disposed of, sold, or exchanged in any way unless a change in the ownership interest ... is thereby effected."). See also *Wolinsky v. Vermont Fed. Bank (In re Vermont Knitting Co.)*, 111 B.R. 464 (Bankr. D. Vt. 1990) (noting that identical definition contemplates "a transfer or substitution of collateral for other property").

As explained by the *Hastie* court:

[T]he term "sale" may be defined generally as "a revenue transaction where goods or services are delivered to a customer in return for cash or a contractual obligation to pay. The term comprehends a transfer of property from one party to another for valuable recompense." *BLACKS LAW DICTIONARY*, 5th ed. at 1200 (1979). Similarly, the term "exchange" may be defined as "the act of giving or taking one thing for another," *id.* at 505, and the term "collect" in the context of a debt or claim may be defined as "payment or liquidation of it," *id.* at 238. Lastly, the phrase "other disposition" may be defined generally as the "act of disposing; or transferring to the care or possession of another; or the parting with, alienation of, or giving up of property." *Id.* at 423.

*In re Hastie*, 2 F.3d at 1045.

When these definitions are applied to the facts of the present case, this court is unable to conclude that the revenues received by Pro Page were "proceeds" of the contracts in question. The monies received by Pro Page for paging services provided postpetition did not result from the sale, exchange or

other disposition of the contracts. Nor did they constitute a disposition by collection since they did not deplete or liquidate the contracts unlike payment on accounts receivables. *Cf. Johnson v. Cottonport Bank*, 259 B.R. 125, 129 (W.D. La. 2000) (U.C.C. definition of proceeds applies to the money accounts receivable are converted into as they are paid). As observed by one court in concluding that a bank's security interest in a debtor's accounts receivable did not extend to income earned postpetition with respect to a prepetition contract, "the prepetition contract for employment only generates 'proceeds' when the contract itself is exchanged based on its intrinsic value. This occurs when the contract is sold, exchanged, or otherwise disposed of, and not when it is performed." *In re Rumker*, 184 B.R. at 626.

The court recognizes that a contrary result was reached in *James Cable Partners*. However, in that case the plaintiff had conceded that the creditor's prepetition security interest attached to revenues generated prepetition by the collateral. *Matter of James Cable Partners*, 141 B.R. at 775. In this court's view, once that concession was made, the outcome of the case was obvious since the revenues did not cease being proceeds upon the bankruptcy filing. *See Cottonport Bank*, 259 B.R. at 128 ("When the debtor grants a security interest in the right to receive a stream of future payments, the security interest continues post-bankruptcy if the right to receive the payments existed prior to bankruptcy and the debtor need not do anything

after bankruptcy to make them continue." ). In the present case, however, no such concession has been made and in fact, Pro Page denies that the prepetition revenues were in any fashion proceeds of the paging contracts.

Furthermore, the *James Cable Partners* court did not utilize the U.C.C. definition of proceeds applicable herein. *Matter of James Cable Partners*, 141 B.R. at 776. Based on a federal standard for proceeds under § 552(b) that admittedly was "broader than that of the U.C.C.," the court concluded that the postpetition revenues were proceeds because the creditor's collateral had been used to generate the revenues. *Id.* However, application of such an attenuated standard would totally emasculate the requirement that revenue be produced by the conversion of the collateral. And, if mere use of collateral were all that was necessary to generate proceeds, ordinary income of a business would be proceeds of any and all pledged assets utilized in the production of income, a result the drafters of § 552 could not have intended. See *In re S & J Holding Corp.*, 42 B.R. 249, 250 (Bankr. S.D. Fla. 1984) (Cash generated from video game equipment is "not received from the sale of the collateral, but rather, through the use of it" and the mere "use of the collateral does not make it 'proceeds.'").

#### IV.

An order will be entered in accordance with this memorandum opinion granting the Potters' motion for partial summary

judgment to the extent that the Potters seek a determination that they have a security interest in all of Pro Page's prepetition contracts for paging services generated by or attributable to the efforts of the Merchants Road location of Pro Page in Knoxville, Tennessee. The order will also grant Pro Page's cross motion for summary judgment based on the determination that the Potters' security interest does not extend to customer contracts originating postpetition from the Merchants Road location or to any postpetition revenues of Pro Page.

FILED: February 27, 2002

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE